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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S SUPPLEMENTAL BRIEF.

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SCOPE OF APPELLANT'S SUPPLEMENTAL BRIEF.

Appellees' Supplemental Brief is in reply to briefs made available to both Appellant and Appellees on the day of oral argument before this Court. The briefs answered by Appellees deal with the whole case, and lay the basis for re-argument of all issues. Appellant must therefore deal

with the issues so re-argued. In view of the fact that the Attorney General of the State of Illinois filed a brief as *Amicus Curiae* in support of Appellees' position, some attention must also be given to that brief.

As to the Attorney General's argument upon the issues, it may suffice to say that the Attorney General construes the opinion of the Illinois Supreme Court in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, as forbidding only compulsory attendance upon religious exercises in public schools, whereas the Court itself said that excusing a student from attending would subject him to a religious stigma and place him at a disadvantage in the school.

Jurisdiction.

Appellees seek to discuss the issue of jurisdiction (pp. 4-5), and say that they deem this question to be controlling. It may be well to mention the grounds on which Appellees have alleged that this Court has no jurisdiction:

(1) Appellees have alleged that Appellant did not raise in the State Supreme Court the issue of violation of the Fourteenth Amendment by use of public employees and public property (Appellees' Brief, 4). The Supreme Court of Illinois was of a different opinion (Trans. 271), and its language has no uncertainty, although it is in error in its indication that Appellant agreed that the religious program is voluntary.

(2) Appellees allege that Appellant's Brief opposing Motion to Dismiss Appeal admitted reliance only upon the validity under the state constitution of the use of public property for religious purposes (Appellees' Brief, 3). By error the word "appellant" appears instead of "appellees," at the beginning of the sixth line from the bottom of page 3 of that Brief, but it is clear that page 3 deals with state issues which do not come to this Court, and that page

4 deals with the federal issues directly involved in this case and specifically asserted in it.

(3) Appellees claim that Appellant has no rights as a taxpayer (Appellees' Brief, 6). The Supreme Court of Illinois recognized this as a taxpayer's action (Trans. 268). Although this Court does not entertain a suit by a taxpayer of the United States, it has systematically entertained suits to prevent the illegal use of money by a municipal body. This is indicated in the recent *Everson* case, and other cases are discussed in *Coleman* v. *Miller*, 307 U. S. 433, 445.

(4) Appellees' chief attack on jurisdiction is based on the fact that Appellant did not in the state courts rely on the First Amendment (Appellees' Brief, and Supplemental Brief, pp. 4-5). Appellant again asserts that her protection arises from the Fourteenth Amendment. No protection from the First Amendment arises directly against state action, although the prohibition of establishment of religion, under the terms of that Amendment, constitutes a portion of the protection of freedom of religion under the definition and application of the Fourteenth Amendment.

The brief of the Attorney General of Illinois seeks to restrict the jurisdiction of this Court in the present case by a claim that Appellant asked for and could receive only a total and absolute interdiction upon the reading of the Bible in any public school building under any circumstances. The language employed in Appellant's prayer for relief is broad, but may properly be construed as limited to the other provisions of her complaint. In any case the rule of Illinois law will apply. It was said in *People ex rel. City of Chicago* v. *Board of Review of Cook County*, 326 Ill. 124 (1927), page 141:

"Upon a petition for a writ of mandamus the court

> is not bound to grant it for all the relief asked but may grant the relief so far as relators show a right to it." Repeated in *Stockholm* v. *Daly*, 374 Ill. 441, page 451 (1940).

The issues presented to this Court by Appellant are all properly before this Court for consideration.

Issues of fact.

Appellees' Supplemental Brief (p. 3) says: "We refer the Court to the agreement in oral argument by counsel for both the Appellant and the Appellees that the trial court's opinion (Tr. 60-89) sets forth a full, fair and accurate summary of the material facts involved." The findings of fact by the trial court do not cover many of the important facts, and at no time did Appellant and Appellees agree upon such findings or upon a statement of facts. In reply to a question from the bench, counsel for Appellees agreed that the facts which he stated were largely in agreement with those stated by counsel for Appellant, but the greater number of these facts were not within the findings by the trial court, and such findings were in some cases not in accord with the record. Neither party has in any way been committed to the findings of the trial court. In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659, this Court stated the principle applicable to a case of this character:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

Appellees call attention to an erroneous citation of the transcript by the American Civil Liberties Brief with respect to opposition by some churches (Appellees' Supplemental Brief, p. 2); but substituted reference is not difficult as to the Unitarian Church (Trans. 217), and as to what appears to have been the difficulty of the Lutheran Church (Trans. 121, 162); and Appellees fully recognize the close religious relations of Urbana and Champaign.

Alleged voluntary character of the religious teaching.

The Appellees' Supplemental Brief devotes several pages to the alleged lawful use of the tax monies for the teaching of opinions with which the taxpayer disagrees, and alleges on page 12 that such a principle applies "whether on religious or on other grounds." Presumably a person could not be required to attend religious teaching, but could be required to pay for it.

We are here dealing with the use of public facilities for religious education in the public schools which the Supreme Court of Illinois says is "upon a purely voluntary basis."

The practice of religious instruction is somewhat as follows:

(a) The religious teachers come from outside—the Catholics from their church and the Protestants from the personnel Committee of the Protestants in the Champaign Council of Religious Education; (b) Pupils are registered through distribution to and collection from them by the public school teacher of Parents Request Cards, which ask that the parent will "please permit" attendance of the class, (Trans. 176); (c) Rooms for classes are determined by school authorities, who usually determine the regular public school class room if all or nearly all have registered; but there is no such possibility with respect to the

small number of Catholics, nor as to the Jews who now have no religious classes; (d) Where all or nearly all pupils attend the religious class, the public school teacher often remains in the room, but here again there is no such possibility with respect to the 3 small classes of Catholics (Trans. 92, 133, 137).

Solicitation by the regular school teachers and presence by such teachers at the religious lessons would, under the purely voluntary view, be free from the influence which school teachers usually have with their young pupils. Nor is weight given to embarrassment resulting from withdrawal from the room—in one case as to Appellant's son's withdrawal to sit alone in the corridor (Trans. 132). Attention may also be given to the fact that in this case the boy's teacher recommended to his mother that the son take the religious work (Trans. 69, 135, 182).

"Voluntary" religious action may be to some extent promoted by (1) solicitation by the public school teacher; (2) advice to the mother by such teacher; and (3) threat of embarrassment should the action not be taken.

The trial court recognized the embarrassment which came from one leaving the room (Trans. 69), and the statement by the Supreme Court of Illinois, in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910), until recently the law of Illinois, is still a true statement supported by the highest courts of Missouri, Iowa, Louisiana and Wisconsin:

> "The exclusion of the pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

There is too much of such religious friction among younger pupils, which is the basis of the statement in the *Ring* case. The trial court found that:

> "The Jewish class of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teachings of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teaching in the Protestant classes would undoubtedly from the evidence, teach some doctrines that would not be accepted by the other two religions" (Trans. 66).

Anti-Semitic and anti-Catholic views may be trained into children at the age when such education is a danger not only to them but to the future of this Country. And such result will be accomplished by religious segregation in the grade schools, especially when some religious groups are in a small minority.

Attendance upon the religious classes may not be purely voluntary when the public school teacher solicits and advises, and when the child is subject to great embarrassment if he fails to join the class. These forces are more efficient when, as here, one religious group is clearly dominent.

Alleged equality of all religions.

Appellees' Supplemental Brief (pages 13-16) gives attention to the fact that control is in the hands of the Board of Education and not in the hands of the Champaign Religious Education Council. It is obvious, of course, that the Religious Education Council acts not as a body with independent governmental powers, but as a body operating with the Board of Education. The powers of the Council depend upon the Board, and, if permitted by the Board, the Council may exercise authority. It may be possible for the dominant religious group to have some influence with the school authorities.

The actions complained of by Appellant are those of the Board of Education performed either directly or through the Champaign Council of Religious Education.

Quotations by Appellees' Supplemental Brief, pages 13-16, do not quite cover the matters dealt with on pages 9-11 of Appellant's original brief. The Superintendent of Schools stated that "all the groups should work together" (Trans. 127). The Council was given power. The Jews and Catholics are members, but play a small part. There are nine Protestant churches of the larger type (Trans. 92, 129). Those not members were Lutheran, Christian Science, Unitarian, Jehovah's Witnesses, Quakers and Twin-City Bible Church. There were 35 classes in 1945 of which three were Catholic (Trans. 91, 150). There were no Jews; between eighteen and twenty-two Catholic students; and more than eight hundred Protestant students (Trans. 150, 258).

The president of the school board testified that all religious groups were to be treated alike (Trans. 127, 128), although he was referring at the time to members of the Council; and the Superintendent of Schools testified that "as far as I know;" class rooms are available to a person who believes in no religion, and that "The school buildings are now available to all religious denominations in this community to be used while they are being used by Students" (Trans. 117-119).

More recently the superintendent added that it would be hard "to work with a lot of different groups" and that "all the groups should work together" (Trans. 127). He would permit Jehovah's Witnesses but appeared to be in doubt as to saluting the flag (Trans. 118, 239).

The trial court found from the evidence that a group must make application to the superintendent of schools "who in turn will determine whether or not it is practical for

said group to teach in said school system" (Trans. 65). There is a discretion in the superintendent, which the trial court was correct in mentioning.

But the record shows a dominance of the Protestant members—of the Champaign Council of Religious Education in right to teach and in what is to be taught. The minister of the Lutheran Church met with the Council to suggest separate teaching of the children of his faith. He testified (Trans. 121):

> "When I offered this suggestion no action was taken on the part of the council, but I was assured that if and when there were sufficient children desiring instruction according to Lutheran faith time would be granted us."

Apparently there was doubt as to separate instruction for more than 25 children. A Presbyterian minister, who was chairman of the personnel committee of the Council testified:

> "I said that the Lutherans may participate in the organization and may teach in the schools too. I do not know whether they want to do so now or not. I said I heard it. I am ready to approve of them sending a teacher into the school. I would welcome the Lutherans but the Council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the course" (Trans. 162).

The Lutheran church could have continued its religious education on Saturday morning, but a smaller group of its character would be in difficulty unless it joined with the Protestant majority.

Even if it were assumed that each religious or non-religious group or individual has an equal right to give instruction as to its views in public schools and during school hours, it is obvious that such groups cannot be

treated equally, for several reasons: (1) There is not separate space enough for such teaching and for the regular school work; (2) except for a consolidation of religious groups, as among the larger Protestant groups in Champaign, there will not be pupils enough in each group for religious classes, and there will be a shortage of religious teachers who may meet approval of the superintendent of schools; Jewish teaching was abandoned for these reasons; (3) a mere presence and sponsorship of the public school teacher who obtained the child's registration for the religious training, and who lives with the child on every school day, has an essential effect upon the child; (4) the use of regular class rooms and removal therefrom of those not participating in the religious class subjects them to a religious stigma referred to by the Supreme Court of Illinois in the *Ring* case; and the transfer of small groups or of individuals from their regular school rooms establishes a sectarian grouping which often brings religious prejudices among children, especially with respect to a small group of Catholics in the basement, and one boy of the class being placed in the corridor.

The Jewish student will in all cases be taken from his class when his school room is to be used for religious education. And the Appellees have twice stated that:

> "The law does not protect against any social consequences of choosing atheism" (Appellees' Brief, 23, 134).

The superintendent of schools says that class rooms will be available to persons who believe in no religion, and Appellees give them a warning should they accept the superintendent's invitation.

It is obvious that a state establishment and maintenance of religion will give a control to the religious group that has the greater number of members, or to the groups which

may unite into a majority. And if religion is established by the state, Appellees have told this Court that the religious groups may take over the public schools.

"Separation of Church and State" as defined in the Everson case.

Unless the emphatic language in both the majority and minority opinions of this Court in the *Everson* case, directly applicable to the contentions made in the McCollum case now in this Court, is to be deleted, and the principles declared and precisely laid down and agreed to by all the members of the Court are now to be repudiated, the decision on the question of teaching religion in the public schools as now presented must inevitably be decided in favor of the Appellant on the authority of the only case in this Court directly in point.

Minority Opinion. In the opinion of Mr. Justice Rutledge, it is said that there are two great questions remaining in the process of separating Church and State required by the First Amendment, since the Fourteenth Amendment has been construed to make the First applicable to state action. One of these, the opinion states, is the use of the taxing power to support religious establishments, and the other is "efforts to inject religious training or exercises and sectarian issues into the public schools." In the latter part of the same opinion an even more direct statement is made. It is there said:

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."

As support for this statement, there is cited among other things the note in 50 Yale Law Journal, page 917, which

discusses at some length the efforts threatening the separation of Church and State in this country (330 U. S., 14, 63).

Majority Opinion. The decision of Mr. Justice Black adverts also to these two drives in recent times. Mr. Justice Black states that the two questions which have most frequently arisen in connection with the separation of Church and State are:

> (1) Proposed state aid to parochial schools, and
> (2) Efforts to carry on religious teaching in the public schools in accordance with the tenets of a particular sect.

The language is:

> "In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect."

The Answer Indicated by Both Sides. Both the minority and majority forecast the answer to the question of religious teaching in the public schools.

Mr. Justice Rutledge for the minority speaks of it as a "threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands," and at page 34 of the opinion he says, speaking of the effort to obtain public funds in aid and efforts to introduce religious education into the public schools: "In my opinion, both avenues were closed by the Constitution."

Mr. Justice Black, speaking for the majority, said:

> "The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and Governments."

This language must be taken in connection with the careful explanation that the "establishment of religion" clause of the First Amendment is designed to secure the same "separation of religions and Governments" that is secured generally in the constitutional provisions of the various states.

The language can only mean that the state courts in deciding against religious teaching in the public schools have remained faithful to the doctrine of the separation of Church and State.

This language, "have remained faithful to the separation of religions and Governments," can only indicate approval of those decisions; but, to put the matter beyond doubt, in the discussion which follows there is the definite statement of what the First Amendment forbids, and it is said "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa." In other words, the state cannot participate in the affairs of religious organizations, and religious organizations cannot participate in the affairs of the state, in whatever form they may adopt to teach or practice religion.

The Meaning of "Separation". In the light of this Court's interpretation of the First Amendment and the clear exposition of the significance of the expression "law respecting an establishment of religion" it is not too difficult to formulate a test of when there is or is not a true "separation of church and state"; nor is it an insuperable task to apply such test to any given case.

What the Constitution of the United States forbids and what the constitutions of all the states forbid though in different forms of expression, is the making of any law or the action of any governmental authority in pursuance of any law that involves the interlocking of the official func-

tions of the state (or any of its agencies) with the official or institutional functions of any church.

When a state acting through its legislature invites or employs a minister of the Gospel to deliver an invocation at the opening of sessions of the legislature, it is dealing with individuals qualified in its judgment to perform the services asked for; it is not dealing with any church as an institution or establishment; it is not making any contract, agreement or arrangement with any Catholic, Protestant or Jewish body in performance of its official religious functions; it is not giving a veto or vote or even any part to any institution outside the institution of government; nor is it giving such participation to any group, organization or association of church bodies, national, state or local.

So when the officials in charge of the activities of the armed forces select certain members of such forces to act as Chaplains, they are not making any agreement with any church organization or group of organizations.

So also when the state exempts from taxation all property used for charitable, cultural or religious purposes, it is not participating in the official functions of any institution or group of institutions or giving any one outside the government a "say so" in the affairs of government. No Catholic, Protestant or Jewish organized group is thereby given a voice in the affairs of government. Equally falacious is the hint that the absolute separation of church and state might in some way prevent our putting the words "In God We Trust" on the coins of the United States.

But there is an interlocking of Church and State when a Catholic, Protestant or Jewish institution, as an institutional function of its organization, makes a compact with a local public school board to handle the children assembled

under the jurisdiction of the school board in performance of its official function and in carrying out and implementing the laws for compulsory education, for the purpose of imparting their respective creeds of Catholicism, Protestantism or Judaism to such children while they are being held in school by the school board. And, of course, it makes no difference in principle, whether the compact is made and carried out by one of such organizations or a combination of any two or three of them.

Conclusion.

A state has no power to establish a religion or to maintain religious groups; and no power can be exercised in the effort to establish or maintain religion without giving an advantage to the religion or religions that are dominant. The aid to such religions through the resources of public schools constitutes in fact an establishment of religion which violates the Fourteenth Amendment both directly and as embracing the liberties guaranteed by the First Amendment.

Appellees not only admit but argue that their plan can be supported only by state establishment of religion. Such establishment is forbidden, and carries with it compulsion and inequality with respect to students who must attend the public schools, while at the same time promoting the interests of dominant religious groups.

Even if it were possible to establish state religion supported by taxation and with an effort in good faith to apply equal treatment to all sects, an equality cannot be maintained in any area in which a religious group has stronger organization and larger membership than others. Our constitution has forbidden both state and national religion for this reason. From the beginning of our

civilization religion has been the primary basis for war and other human friction, and public schools should not be employed to continue religious friction.

Respectfully submitted,

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